A

Sin Heap Lee–Marubeni Sdn Bhd v Yip Shou Shan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–73 OF 2002
MOKHTAR SIDIN, MOHD SAARI YUSOFF AND ABDUL AZIZ MOHAMAD JJCA

B 16 JULY 2004

Civil Procedure — Appeal — Adducing fresh evidence — Evidence not in existence at time of hearing — Whether affects decision on award of damages — Courts of Judicature Act 1964 s 69 — Rules of the Court of Appeal 1994 r 7(3A)

C

Tort — Damages — Trespass to land — Excavation — General damages and exemplary damages — 'Cost of restoration' test — Conduct of appellant to make profit — Whether a relevant consideration in calculating exemplary damages

D *Civil Procedure — Locus standi — Whether respondent's claim made before he became registered proprietor — Continuing act of trespass — Respondent was not in possession of said land when first incident of trespass occurred — Whether relevant*

E The cause of action in the present appeal was trespass by the appellant, in respect of the respondent's land between 1993 to 1996. The respondent instituted the present action in the High Court seeking general damages and exemplary damages based on trespass and nuisance. The trial judge awarded actual damages in respect of that trespass and the nuisance created on the respondent's land at the time when the cause of action arose. The appellant now seeks to adduce fresh evidence at the trial to show to the court that the damages suffered by

F the respondent could be minimised taking into consideration the alternative access road that was to be made available. The second issue raised by the appellant was whether the respondent took possession of the land before the first incident of trespass which was before 10 June 1991, since the respondent's right of entry accrued only on 29 June 1991 which was the date the respondent

G became entitled to possession of the land in law and therefore have no *locus standi* to sue. The other issue is whether the trial judge correctly applied the 'cost of restoration' test and that exemplary damages should not be awarded because compensatory damages had been awarded.

H **Held**, dismissing the appeal by majority:

(1) (per **Mokhtar Sidin JCA**) It is clear that the evidence was not only unavailable at the trial but also non-existent. The alternative access road was only made available some six months after the trial judge delivered his judgment when another of the respondent's neighbour commenced

I to develop their land and in that process constructed a road right to the edge of the respondent's land. It is to be noted that this was not done by the appellant to minimize the damages but the appellant wanted to

take advantage of it. In my view, r 7(3A) of the Court of Appeal Rules envisages an occurrence that took place before the trial or during the trial but was not made available at the trial or that reasonable diligence would not have made it so available (see para 11).

(2) (per **Mokhtar Sidin JCA**) The intended evidence of the alternative road would not affect the trial judge's decision on the award of damages suffered by the respondent. The damages awarded by the trial judge was in respect of the excavation works by the appellant which not only affected the access road but also the respondent's land and the conduct of the appellant in refusing to meet the respondent to resolve those problems in order to remedy the nuisance created and also to protect the respondent's land from further damages (see para 12).

(3) (per **Mokhtar Sidin JCA**) The trespass committed by the appellant was a continuing act of trespass from the time when the respondent was not in possession of the land to the time he came into possession of the land and in fact continuing after he came into possession of the said land (see para 22).

(4) (per **Mokhtar Sidin JCA**) As long as the condition of the said land remained the same the trespass is continuing. In view of the continuing trespass, it does not matter whether the respondent was in possession of the said land when the first incident of trespass took place. It was not disputed that the respondent came into possession when the excavation was still being carried out by the appellant (see para 29).

(5) (per **Mokhtar Sidin JCA**) The trial judge had considered all options available to arrive at the cost of repair or reinstatement as to the true measure of damage. The trial judge correctly pointed out that the conduct of the appellant in committing trespass and nuisance was calculated to make profit and that must remain a relevant consideration in the calculation of exemplary damages (see para 40).

(6) (per **Abdul Aziz Mohamad JCA** dissenting) Since trespass is an injury to a possessory right, the proper plaintiff in an action of trespass to land is a person who was in possession of the land at the time of the trespass. The respondent, in his statement of claim, did not plead a right to possession. He merely pleaded that he was the registered proprietor of the land. Since the first incident of trespass occurred before the respondent became registered proprietor of the land, and even before he became entitled to possession of the land, the respondent did not have *locus standi* to sue in trespass in respect of the first incident (see para 58).

(7) (per **Abdul Aziz Mohamad JCA** dissenting) To deny the appellants the right to argue about *locus standi* because it had not been pleaded

would be to allow the respondent to claim in trespass when his own case showed that he was not entitled to do so (see para 71).

(8) (per **Abdul Aziz Mohamad JCA** dissenting) Section 69 of the Courts of Judicature Act is not affected by para (3A) of the Rules of the Court of Appeal 1994 and further evidence as to post-decision matters may still be given, and as of right. The requirements of special grounds and of leave do not apply to post-decision matters. A subsidiary legislation is not capable of modifying an Act of Parliament, except by express authority of Parliament, which does not exist here (see para 82).

[**Bahasa Malaysia summary**

Tindakan dalam rayuan ini adalah untuk pencerobohan oleh perayu ke atas tanah responden di antara tahun 1993 sehingga 1996. responden telah memulakan tindakan di Mahkamah Tinggi menuntut ganti rugi am dan ganti rugi teladan berdasarkan pencerobohan tersebut dan kacau-ganggu. Hakim yang bicara telah memberikan award ketara berhubungan dengan pencerobohan dan kacau-ganggu yang dialami oleh responden ke atas tanahnya pada ketika wujudnya kuasa tindakan. Perayu sekarang cuba mengemukakan keterangan selanjutnya semasa rayuan ini didengar untuk menunjukkan kepada mahkamah bahawa ganti rugi yang dialami oleh responden dapat dikurangkan dengan mengambil dalam pertimbangan jalan masuk yang alternatif yang akan disediakan kelak. Isu yang kedua yang dibangkitkan oleh perayu ialah sama ada responden mengambil milikan tanah tersebut sebelum kejadian pencerobohan yang pertama iaitu sebelum 10 Jun 1991, oleh kerana hak plaintif untuk masuk hanya pada 29 Jun 1991 iaitu tarikh di mana responden berhak memiliki tanah tersebut mengikut undang-undang dan dengan ini tiada *locus standi* untuk membawa tindakan ini. Isu yang lagi satu ialah sama ada hakim yang bicara betul dalam menggunakan ujian 'kos membaik pulih' dan bahawa ganti rugi teladan tidak sepatutnya diawardkan oleh kerana ganti rugi pampasan telah diawardkan.

Diputuskan, rayuan ditolak oleh majoriti:

(1) (oleh **Mokhtar Sidin HMR**) Ia adalah jelas bahawa tidak terdapat keterangan bukan sahaja pada ketika perbicaraan tetapi keterangan tersebut tidak wujud. Jalan masuk yang alternatif hanya wujud enam bulan selepas hakim bicara memberikan penghakimannya apabila jiran responden yang satu lagi mula membangunkan tanah mereka dan didalam proses itu, membina satu jalan sehingga ke tepi tanah responden. Ia harus diperhatikan bahawa pembinaan ini bukannya dilakukan oleh perayu untuk mengurangkan ganti rugi mereka tetapi perayu hanya ingin mengambil kesempatan di sini. Dalam pandangan saya, k 7(3A)

Kaedah-Kaedah Mahkamah Rayuan menggambarkan satu kejadian yang berlaku sebelum perbicaraan ataupun ketika perbicaraan tetapi keterangan tidak dapat diberikan pada perbicaraan tersebut ataupun usaha yang wajar masih tidak dapat menghasilkan keterangan tersebut (lihat perenggan 11).

(2) (oleh **Mokhtar Sidin HMR**) Keterangan jalan masuk alternatif yang diharapkan tidak akan mempengaruhi hakim bicara dalam memutuskan award ganti rugi yang dialami oleh responden. Ganti rugi yang diawardkan oleh hakim bicara adalah berhubungan dengan kerja-kerja penggalian oleh perayu di mana ia bukan sahaja menjejaskan jalan masuk tetapi juga tanah responden dan kelakuan perayu yang tidak ingin menemui responden untuk menyelesaikan masalah-masalah ini untuk meremedikan pencerobohan yang dilakukannya dan juga untuk melindungi tanah responden daripada kerosakan yang selanjutnya (lihat perenggan 12).

(3) (oleh **Mokhtar Sidin HMR**) Pencerobohan yang dilakukan oleh perayu adalah pencerobohan yang berterusan dari masa responden masih belum lagi memiliki tanah tersebut sehingga apabila responden memiliki tanah tersebut dan sebenarnya telah diteruskan selepas responden memiliki tanah tersebut (lihat perenggan 22).

(4) (oleh **Mokhtar Sidin HMR**) Asalkan keadaan tanah tersebut tidak berubah, pencerobohan adalah berterusan. Memandangkan pencerobohan ini berterusan, ia tidak kira sama ada responden memiliki tanah tersebut ketika kejadian pencerobohan yang pertama itu. Adalah tidak dipertikaikan bahawa responden memiliki tanah tersebut semasa penggalian masih dijalankan oleh perayu (lihat perenggan 29).

(5) (oleh **Mokhtar Sidin HMR**) Hakim yang bicara telah mempertimbangkan segala pilihan dalam mencapai keputusannya dalam memutuskan bahawa kos pembaikan atau pengembalian tanah sebagai nilai kerugian yang sebenarnya. Hakim bicara telah betul dalam merujuk kepada kelakuan perayu di mana pencerobohan tersebut dan kacau-ganggu adalah untuk keuntungan dan bahawa ini semestinya pertimbangan yang relevan didalam pengiraan ganti rugi teladan (lihat perenggan 40).

(6) (oleh **Abdul Aziz Mohamad HMR** menentang) Oleh kerana pencerobohan merupakan kerosakan kepada milikan yang sah, plaintif yang sewajarnya dalam suatu tindakan pencerobohan ke atas tanah ialah orang yang sah memiliki tanah tersebut pada masa pencerobohan. responden, dalam pernyataan tuntutannya, tidak memplidkan milikan yang sah. Dia hanya memplidkan pengguna berdaftar. Oleh kerana kejadian pertama pencerobohan berlaku sebelum responden menjadi pengguna berdaftar tanah tersebut, dan sebelum dia berhak memiliki milikan yang sah, responden tidak mempunyai *locus standi* untuk

mendakwa pencerobohan berhubung dengan kejadian pertama (lihat perenggan 58).

(7) (oleh **Abdul Aziz Mohamad HMR** menentang) Dengan menafikan perayu haknya untuk membantah atas isu *locus standi* oleh kerana ia tidak diplidkan oleh perayu adalah membenarkan responden menuntut pencerobohan apabila kesnya sendiri menunjukkan dia tidak berhak membuat demikian (lihat perenggan 71).

(8) (oleh **Abdul Aziz Mohamad HMR** menentang) Seksyen 69 Akta Kehakiman Mahkamah 1964 tidak dipengaruhi oleh perenggan (3A) Kaedah-Kaedah Mahkamah Rayuan 1994 dan keterangan selanjutnya berhubungan dengan keputusan yang telah lepas masih boleh dibenarkan, mengikut hak. Keperluan alasan-alasan yang khas dan kebenaran tidak dipakai terhadap keputusan yang telah lepas. Sesuatu undang-undang subsidiari tidak berkemampuan mengubah suai Akta Parlimen, kecuali melalui bidang kuasa Parlimen, di mana tidak terdapat di sini (lihat perenggan 82).]

Notes

For cases on adducing fresh evidence, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 588–592.

For cases on damages caused by trespass to land, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) para 219

For cases on *locus standi* generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3924–3981.

Cases referred to

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252 (refd)

Chen Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)

Rookes v Barnard [1964] AC 1129 (refd)

Tay Tuan Kiat & Anor v Pritam Singh Brar [1987] 1 MLJ 276 (refd)

Templeton v Low Yat Holdings Sdn Bhd [1993] 1 MLJ 443 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 69(1), (2), (3)

Rules of the Court of Appeal 1994 r 7(3A)

Rules of the High Court 1980 O 18 r 8(1)

Robert Lazar (Alan Su Kok Cheng and Lim Fang Say with him) (Chan & Assoc) for the appellant.

Respondent in person (Nasir, Kenzin & Tan).

Appeal from: Civil Suit No S1–22–761 of 1993 (High Court, Kuala Lumpur)

MOKHTAR SIDIN JCA (delivering majority judgment):

[1] We have given our decision earlier whereby by majority, we have dismissed the application to adduce fresh evidence and we have also dismissed the appeal with costs. My brother, Abdul Aziz Mohamad JCA, had his reservations. I am now giving the grounds for the majority decision in dismissing the application and the appeal proper.

[2] The respondent in the present appeal is the registered owner of the land known as Lot 1360 Mukim of Cheras, District of Hulu Langat (hereinafter referred to as 'the said land') whereas the appellant is the registered owner of the land known as Lot 150 Mukim of Cheras, District of Hulu Langat. The two pieces of land were separated on its southern boundary by a strip of State land approximately 40 feet wide which is known as 'the road reserve'. It was not disputed that the appellant at the material time were carrying on development works on their land for the purpose of developing it into a golf course and a huge residential and commercial complex known as 'Bandar Sungei Long'. In carrying on those works the appellant encroached onto the respondent's land whereby the appellant committed trespass on the respondent's land. In addition, in carrying out the development works, the appellant had committed physical damage to the respondent's land. The respondent had proved the physical damage caused to his land in the court below when a survey was conducted on 11 January 1993 whereby a plan was prepared by one of the witnesses (SP2) which shows that as a result of the development works carried out by the appellant on their land a steep slope of about 100 feet high and 650 feet long and about 49 feet deep was created on the respondent's land. The slope was sited entirely on the respondent's land falling on the access reserve. It is clear from the record that the appellant did not dispute this fact. It is also in evidence that sometime in February 1996 the appellant, without the consent of the respondent, constructed a crib wall on the access road reserve, part of which is on the respondent's land.

[3] The respondent instituted the present action in the High Court seeking general damages and exemplary damages based on trespass and nuisance. He also sought the following prayers:

(a) a declaration that the appellant is not entitled to cut or alter the public road access or otherwise appropriate the road reserve so as to deprive the respondent of access to his land;

(b) a declaration that the respondent is entitled to use and enjoy the road reserve as access to the respondent's land or the right of support to the said road reserve;

(c) injunction to restrain the appellant whether by themselves, their servants or agents howsoever from encroaching into the respondent's land;

(d) a mandatory injunction directing the appellant to forthwith at their own costs reinstate and rehabilitate the ground levels of the respondent's land and the road reserve adjoining the said land:

(i) by constructing a reinforced earth wall at the boundary between the appellant's land and the road reserve to the height up to the utmost original ground level; and

(ii) thereafter by backfilling with sand and earth up to the level of the reinforced earth wall;

(e) a mandatory injunction directing the appellant to forthwith at its own costs construct an access to the south-east boundary of the road reserve to the respondent's land at a level of 60 meters and for this purpose to construct a reinforced earth wall at both sides of the 66 feet road on the appellant's land to allow for the access;

(f) a mandatory injunction directing that in the execution and completion of the above said works the appellant do comply at their own costs with the earthwork plan and reinforced earth wall details as shown in drawing No PB 9200-SP-l and PB 9200 CS1 and specifications prepared by the consulting engineers, Messrs Perunding Bakti Sdn Bhd and annexed thereto as Annexure 1; and

(g) an order that the completion of the above said works be evidenced by a certificate of completion to be issued by the consulting engineers.

[4] At the end of the trial, the learned judge declined to grant the declarations and the injunctions sought by the respondent and he gave his reasons as follows:

> On the remedies sought by the plaintiff, I decline to grant the declarations and the injunctions because:
>
> (i) in respect of declarations (a) and (b), the access reserve is already obsolete in view of the surrounding development where there is an alternative access to the plaintiffs land. Further, in the course of submission the plaintiff indicated that he was no longer interested in the access through the access reserve under the existing state of the land;
>
> (ii) or injunction (c), since the incident, except for the construction of the crib-wall, there had been no complaint of any alleged intrusion. Further, there is no reason now for the defendant to enter into the plaintiff's land;
>
> (iii) with regard to mandatory injunctions (d), (e) and (f) and order (g), the plaintiff indicated during the submission that he was no longer interested in the reinforced earth wall because it might pose a serious

danger to the residents of the condominium below on the defendant's land during the course of its construction. Further a thorough supervision by an expert appointed by the parties or the court will be required in the course of its construction.

[5] In respect of the compensatory damages the learned judge made the following order:

Therefore, judgment is hereby entered against the defendant, with costs as follows:

(1) To pay the plaintiff:

(a) RM3.6 million as compensatory damages;

(b) RM900,000 as exemplary damages;

(c) RM16,248 as special damages.

(2) For items (a) and (b), the interest is at 8% per annum from the date of the service of the writ until the date of judgment and for item (c) at 4% per annum from the date of the respective engagement of the surveyor and the engineer to date of judgment; and on all the items at 8% per annum from the date of judgment until realisation.

[6] Being dissatisfied with that decision the appellant who were the defendant in the court below appealed to us. There was no cross appeal by the respondent.

[7] It is to be noted that the appellant also filed a notice of motion dated 11 July 2002 seeking the following order:

(a) That in the event that leave is necessary, that the appellant be granted leave to have further evidence in relation to the earth works and other development of the respondent's land on Lot 1360 to be admitted on the hearing of the appeal herein; alternatively

(b) That such further evidence in relation to the earth works and other development of the respondent's land on Lot 1360 be received on the hearing of this appeal; and

(c) That this honourable court do give suitable directions for the reception of such further evidence by oral examination in court or by affidavit or by deposition.

[8] As stated in the affidavit in support affirmed by Ch'ng Cheah Chean the reasons for making the application are as follows:

5) In the High Court the respondent sued the appellant in trespass and nuisance for essentially entering Lot 1360 and damaging his land. The learned judge found that the appellant had cut into the respondent's land an area of about 100 feet high and 650 feet long and about 49 feet deep into the respondent's land. He found that as a result of this, the respondent's loss of use of his land was 0.6294 acres and that the loss for the setback was 1.2843 acres. He also made a finding that if the respondent intended to develop his land, extra

protection on the slope was needed otherwise the setback as illustrated was necessary or very expensive foundation work was required.

6) Having found the appellant liable in trespass and nuisance the learned judge then dealt with the remedies to be granted to the respondent and refused to grant a mandatory injunction as prayed for by the respondent for the construction of a retaining wall because:

> the respondent indicated during the submission that he was no longer interested in the reinforced earth wall because it might pose a serious danger to the residents of the condominium below on the appellant's, land during the course of its construction.

7) Having declined to grant both declaratory and injunctive relief, the learned judge then proceeded to make an award of damages. In approaching the question of the assessment of damages, the learned judge declined to assess the respondent's loss on the basis of the diminution in value of the respondent's land as a result of the damage to Lot 1360. The learned judge did so on the basis that it was 'unrealistic and unfair to either party' to assess damages on the basis of the diminution in value.

8) The trial judge then proceeded to award damages on the basis that the respondent intended to develop the land according to the sub-division as approved and awarded damages on the basis of reinstatement and ruled that 'if the plaintiff is to put the land any use at all, the construction of a retaining wall is the only solution because the danger to life and property, both to the occupants above and below is clearly foreseeable'. On this basis the judge then proceeded to make the award of damages as set out above. An award for exemplary damages formed part of the award of damages.

9) It will be the appellant's contention during the course of this appeal that the trial judge was in error in having adopted the basis of reinstatement as the basis for awarding damages. Notwithstanding this the issue of the need for, extent and cost of reinstatement is very much linked to the need for the construction of a retaining wall. In this regard it would have been important to take into account the fact that if the respondent was to develop Lot 1360, that he would be required to bring down the platform level of Lot 1360 and in the circumstances the question of the construction of a retaining wall, and even the loss of usable land of Lot 1360 would vary according to how the respondent was to develop the land.

10) Learned counsel for the appellant will, in the course of this application refer to the various parts of the evidence and the grounds of judgment of the trial judge, which are contained in the record of appeal.

11) In the course of the trial the respondent indicated that he was no longer interested in the access from the state reserve as he could obtain access to Lot 1360 from Bandar Mahkota Cheras. Some time around the middle of April 2002, I proceeded to take some photographs of the state of the respondent's land in relation to Bandar Mahkota Cheras.

12) After judgment was delivered in this matter, sometime around the 26 of June 2002 it had come to my attention that works were being carried out on the respondent's land, albeit from the point of entry from the Bandar Mahkota site. I then proceeded to the site in question on the 26 of June 2002 and

noticed that extensive earthworks were being carried out on Lot 1360 and I had then taken photographs of such development. The earthworks were still continuing, and on 4 July 2002 I proceeded to take further photographs.

13) I now produce and mark as exhibits, these photographs and the positions where these photographs were taken marked on the sketch plan:

(i) Exhibit 'CCC–2' — Photographs taken on 3 April 2002 and 4 July 2002 from position 'A' which are marked on the sketch plan (exh 'CCC–1')

(ii) Exhibit 'CCC–3' — Photographs taken on 3 April 2002, 26 June 2002 and 4 July 2002 from position 'B' which are marked on the sketch plan (exh 'CCC–1')

(iii) Exhibit 'CCC–4' — Photographs taken on 3 April 2002, 26 June 2002 and 4 July 2002 from position 'C' which are marked on the sketch plan (exh 'CCC–1')

14) Comparing the development of Lot 1360 as seen from the exhibits as against the state of the land as at 4 July 2002, it is clear that the platform levels of the respondent's land will be brought down. I will in a further affidavit produce a copy of a sketch plan which shows the sectional layout of the respondent's land prior to these works and the levels after the earthworks are done. I must however emphasize that these are mere calculations as we do not have permission to go onto the respondent's land in order to undertake a detailed survey.

15) However from this evidence it is clear that:

(a) there is no need to build a reinforced retaining wall as proposed by the respondent. In fact, the existing crib wall provided by the appellant on the state land is adequate for support;

(b) alternatively, if the reinforced retaining wall is required for full reinstatement, the costs of such a wall will be greatly reduced due to loss of land surcharge (weight of soil);

(c) the loss of usable land is also less;

(d) the loss of soil is also less;

(e) that the stability of the soil and/or land is improved due to the reduction in the height of the slope; and

(f) the set back proposed by the respondent should not be in issue.

16) The evidence that I refer to above is the evidence that the appellant wishes to adduce at the hearing of this appeal. The evidence in question occurred well after judgment was delivered in this matter and obviously could not be referred to at the trial. However I am advised by the appellant's solicitors and believe that his is evidence that is credible, and relevant and would have a direct bearing on the issue of damages in the event the Court of Appeal affirms the judge's findings on the question of liability and then proceeds to deal with the issue of the quantum of damages.

[9] The appellant admitted that this application tantamount to adducing fresh evidence at the trial. That being the case those documents could only be

admitted if they satisfy r 7 of the Court of Appeal Rules which provides as follows:

> 7 Power of Court to amend, admit further evidence, or draw inferences of fact
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> (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.
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> (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
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> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court,
>
> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:
>
> (a) at the hearing before the High Court or the subordinate — court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.
>
> (4) The Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.

[10] In order for the application to be allowed the appellant had to satisfy the conditions as stated in para (3A). There is no doubt in my mind that what the appellant attempted to produce was a happening after the facts. The cause of action in the present appeal was trespass by the appellant in respect of the respondent's land between 1993 to 1996. The damages by the judge was in respect of that trespass and the nuisance created on the respondent's land at the time when the cause of action arose. The appellant in the present application is making an attempt to show to this court that the damages suffered by the respondent could be minimized taking into consideration the present day situation and condition long after the trespass and nuisance had been committed and long after the trial. The judge in his judgment awarded the actual damages suffered by the respondent when the trespass and nuisance

were committed by the appellant which were never remedied until the trial even until the judgment was given.

[11] As I have stated earlier, the appellant conceded that the evidence intended to be adduced did not occur before the trial or during the trial. It occurred long after the trial in the High Court had been concluded. It is clear to me that the evidence intended to be adduced was in respect of an occurrence long after the incident and after the trial. This evidence was the availability of an alternative access road to the respondent's land long after the trial (almost ten years after the respondent had filed the present action). It is clear to me that evidence was not only not available at the trial but also non-existent. The alternative access road was only made available some six months after the trial judge delivered his judgment when another of the respondent's neighbour commenced to develop their land and in that process constructed a road right to the edge of the respondent's land. It is to be noted that this was not done by the appellant to minimize the damages but the appellant wanted to take advantage of it. It was an occurrence after the judgment. In my view, r 7(3A) envisages an occurrence that took place before the trial or during the trial but was not made available at the trial or that reasonable diligence would not have made it so available.

[12] The second test as stated by para (3A) is that the new evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the High Court. My understanding of the present appeal, the issue before the trial judge was in respect of trespass and nuisance committed by the appellant on the respondent's land and the damages the respondent had suffered. The relevant period, in my opinion, was the time when the trespass and nuisance occurred and the remedial steps taken by the appellant during that relevant period to minimize the damages suffered by the respondent. The judge in making his decision had rightly considered all the facts and evidence made available to him and the remedial steps taken by the appellant in order to minimize the damages suffered by the respondent. The fresh evidence intended by the appellant was not a remedial step taken by the appellant but a fact occurring after the event by a third party whereby an alternative road was to be made available to the respondent's land long after the respondent suffered the damages as found by the judge. In fact, the trial judge in his judgment dealt more on the damages to the land rather than the availability of the access road destroyed by the appellant. The judge dealt with the access road when he considered the application for an injunction by the appellant which was refused. In my view, the intended evidence of the alternative road would not affect the judge's decision on the award of damages suffered by the respondent. The damages awarded by the trial judge as can be seen from his judgment was in respect of the excavation works by the appellant which not only affected the access road but also the respondent's land and the conduct of the appellant in refusing to meet the respondent to

resolve those problems in order to remedy the nuisance created and also to protect the respondent's land from further damages. In his judgment, the trial judge also took into consideration the attitude of the appellant in refusing to admit the encroachment on the respondent's land when it was so obvious.

[13] In respect of the issue to be raised by the appellant in their application to adduce fresh evidence we have only to refer to the relevant paragraphs in the affidavit in support of the application. The deponent of the affidavit, at paras 8 and 9, stated:

> (8) The trial judge then proceeded to award damages on the basis that the respondent intended to develop the land according to the sub-division as approved and awarded damages on the basis of reinstatement and ruled that 'if the plaintiff is to put the land any use at all, the construction of a retaining wall is the only solution because the danger to life and property, both to the occupants above and below is clearly foreseeable'. On this basis the judge then proceeded to make the award of damages as set out above. An award for exemplary damages formed part of the award of damages.
>
> (9) It will be the appellant's contention during the course of this appeal that the trial judge was in error in having adopted the basis of reinstatement as the basis for awarding damages. Notwithstanding this the issue of the need for, extent and cost of reinstatement is very much linked to the need for the construction of a retaining wall. In this regard it would have been important to take into account the fact that if the respondent was to develop Lot 1360, that he would be required to bring down the platform level of Lot 1360 and in the circumstance the question of the construction of a retaining wall, and even the loss of usable land of Lot 1360 would vary according to how the respondent was to develop the land.

[14] The respondent's response to this is found in paras 6(a)–7(d) of the affidavit dated 18 July 2002 where he deposed as follows:

> 6(a) *In law*, damages are assessed at the trial. The plaintiff/respondent's claim is to require the appellant to construct a reinforced earth wall to the height up to the utmost *original ground level* based on plans and specification annexed to the statement of claim. The plan and the cost of reinstatement was computed by the respondent's consulting engineer, SP5, a former dean of the engineering faculty of University of Malaya and former president of the institute of engineers, whom the judge accepted as a credible witness. The judge has no power to award damages in lieu of mandatory injunction based on a earth wall of any other height other than to its original ground level. That is the only assumption permissible in law.
>
> 6(b) The appellant is not entitled, at the appeal stage, to ask for a fresh trial for re-assessment of the damages awarded based on an assumption which is utterly speculative. Conversely, the respondent has no right, at this stage to adduce evidence to show that the cost of reinstatement of the land to its original heights or to the height as altered (which is denied) far exceed the RM3.6 million awarded by the judge (which I verily believe, would be the most likely result, having regard to the need to remove the crib-wall and the existence of the condominium below).

7(a) *On the facts*, contrary to the appellant's assertion, the height and configuration of the slope is not affected by the recent earthworks. I now produced and marked 'Exhibit PY1', a survey dated October 1998 which shows two slopes rising to about 17 meters (60 feet) high adjoining the development of Mahkota Cheras, belonging to Narajaya Sdn Bhd. These slopes are also depicted in photographs of Exhs 'CCC–B' and 'CCC–C' of Ch'ng's affidavit.

7(b) In May 2002, I was approached by the Project Manager of Narajaya Sdn Bhd who requested that the slopes be trimmed as it will pose danger to their development. I agreed on condition that my land is to be maintained at two meters above their platform level. I now produced and marked Exh 'PY–2' the letter evidencing this arrangement.

7(c) The recent earthworks have no effect whatsoever on the height of slopes created by the appellant. This is clearly evident from the photograph, 'CCC–A' of 4 July 2002 and the photographs I took on 11 July, 2002, both of which are produced marked Exhs 'PY3–A' and 'PY4–B'. I have marked a point on the original slope as shown in the first photograph dated 3 April 2002 in 'PY3–A' and similar markers of the point at the other photographs dated 7 July 2002 and 11 July 2002 to indicate that the heights of the slope has not changed perceptibly.

7(d) I visited the site on 12 July 2002 with a manager of Narajaya Sdn Bhd who informed me that the earthwork on Lot 1360 has been completed. 1 now produced marked Exh 'PY–4' a letter dated 12 July 2002 containing this. There is no question whatsoever that the height in the slope will be brought down as the level of Lot 1360 and that of Mahkota Cheras is not almost the same. This is clearly evident from the first photograph in Exh 'PY3–B' which shows that the height on the present slope in relation to the adjoining 'turfed' area belonging to Mahkota Cheras.

[15] It is clear from the above that the fresh evidence that the appellant intended to adduce further was on the assumption that the ground level of the land would be brought down but there was no evidence that that was so. This assumption was based on the fact that there were some earthworks on the respondent's land and the adjoining land. With those earthworks, the appellant assumed that the respondent's land could be entered from the other neighbouring adjoining lot which was to be developed some ten years after the respondent had filed this action. In my view, those facts have nothing to do with the damages suffered by the respondent. To find an alternative road to his land was the respondent's only option to make the optimum use of his land after the original access road had been destroyed.

[16] The appellant in their affidavit in reply affirmed by Ch'ng Cheah Chean on 19 July 2003 confirmed, my view that the application to adduce fresh evidence was only to make an assumption and assertion as stated at para 4(d):

4 Para 6(a) of the respondent's affidavit is denied. I am advised by the appellant's solicitors and verily state as follows:

(d) It will be the appellant's contention during the course of this appeal that the court must take into account the fact that if the respondent was to develop 1360, he would be required to bring down the platform level of 1360 and in the circumstances the height of a retaining wall would vary according to how the respondent was to develop the land.

[17] In my view, this is not evidence at all but only an assumption which the appellant could submit during the trial. In my view, there is no fresh evidence in the application at all.

[18] In my view, the application did not satisfy the conditions imposed by r 7 of the Court of Appeal Rules. For that reason, by majority decision, we dismissed the application by the appellant.

[19] I will now deal with the appeal proper based on the record of appeal without fresh or further evidence.

[20] The first issue raised by the appellant's learned counsel in his submission was grounds 1 and 2 in the memorandum of appeal. The appellant's learned counsel submitted that the judge was in error when he held that the respondent took possession of the land before the first incident of trespass. The judge came to that conclusion when he found that the respondent's right of entry accrued on 29 June 1991 which was the date the respondent became entitled to possession of the land in law and the date the respondent was contractually entitled to vacant possession on completion of sale. The judge went on to hold that the respondent and his agents entered and took physical possession when the first survey was conducted on 18 July 1991. The appellant's complaints were:

(a) that the judge did not make any specific finding as to when the first incident took place;

(b) all the available evidence show that the first incident took place before 10 June 1991;

(c) Had the judge properly evaluated the evidence he would have concluded that at the time of the first incident (prior to 10 June 1991) the respondent was not entitled to possession and hence had no standing to sue in respect of this incident.

[21] The judge in his judgment stated as follows:

4 With due respect I do not agree with such contention.

(1) Firstly, Clause 3.1 of the sale and purchase agreement stipulates that the balance of the purchase price shall be paid within three months or within one month of the removal of the private caveat, which date is the later. On the facts as agreed, the plaintiff paid the balance of the purchase price on 29 June 1991. To my mind, based on sound logic that a purchaser of the land will not pay the full purchase price unless the caveat is removed it is irresistible to infer that, in the present case, the caveat must have already been removed before

the plaintiff paid the balance of the purchase price. Hence, the later date as envisaged in Clause 3.1 must be taken to mean 29 June 1991 when the full purchase price was paid to the vendor. Further, as the agreement was entered on 30 March 1991 and the balance of the purchase price was paid on 29 June 1991 it is clear that the full purchase price was timeously paid. And further, by reason of the fact that the plaintiff paid the balance of the purchase price and the defendant did receive it on 29 June 1991 it is safe to conclude that the requirements of Clauses 4.1, 4.2 and 5.1 of the agreement had been fulfilled earlier that is to say, the vendor had given to the plaintiffs solicitors a duly executed, valid and registrable transfer of Lot 1360 in due form in favour of the plaintiff. The legal position between vendor and purchaser is well-settled in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, where the Federal Court held:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, it is then that the vendor divest himself of his interest in the land.

Therefore, based on this authority, as at 29 June 1991, the vendor was a bare trustee and the plaintiff became entitled to possession of the land in law; and by Clause 6 of the agreement the plaintiff was contractually entitled to vacant possession on completion of the sale; and hence, the plaintiff's right of entry accrued on 29 June 1991. By the doctrine of relation back, if an owner who has a right to enter makes an entry on land, his right of possession related back to the time at which his right of entry accrued, and he may sue for a trespass committed before his entry, the wrongdoer thus becoming a trespasser by relation (see *Halsbury's Laws of England* 4th Ed para 1397 and *Clerk & Lindsell On Torts* 17th Ed at 850). The plaintiff and his agents entered and took physical possession of the land on 18 July 1991, that is to say, before the first incident when the first survey was conducted. Therefore, by the doctrine of relation back, the plaintiff is clearly entitled to maintain this action even though he was not in physical possession at the time of the first incident.

(2) Secondly, the issue of possession was not pleaded by the defendant. In para 5 of the statement of claim the plaintiff alleged that in or about July 1991 he discovered that the defendant had in the process of executing the development works excavated a steep slope on the access reserve abutting his land and otherwise encroached and/or cut into his land, the particulars of which are stated therein. The defendant, in response to the allegation, by paras 5 to 7 in the defence did not raise or allude to the issue of possession. In consequence, the plaintiff had no opportunity to rebut the issue in the Reply. The defendant in para 2 of the defence merely stated that the plaintiff was registered as the proprietor of the land only on or about 27 July 1991 and in cross-examination the plaintiff (SP1) was only asked as t6 when he became the registered proprietor of the land. To my mind, this is not a defence to an action for trespass because trespass is essentially an inference with the possessory rights and not ownership, since registered ownership does not usually connote legal possession. Therefore, on the pleading as it stands and the evidence adduced, in law and in the interest of justice, the defendant should not be allowed to submit on the issue of possession, being repugnant to all the three situations as envisaged in O 18

r 8(1) of Rules of the High Court 1980. The proper defence to trespass to land is to deny possessory title of the plaintiff which must be specially pleaded (re *Bullen and Leake and Jacob's Precedents of Pleadings* 12th Ed at 1324).

(3) Thirdly, there is only one slope, that is to say, the slope as evidenced by the survey at B-20 which is the subject matter of the plaintiff's claim and for which the plaintiff is seeking relief.

(4) Lastly, the plaintiff's cause of action is based on both tort of trespass and nuisance. It is trite law that the duty of care owed by the landowners to their neighbours not to disturb or withdraw natural right to support, that is to say, soil to soil support will give rise to a cause of action in negligence and/or nuisance (see *Wong See Lee & Ors v Ting Siik Toy, Re* [1997] 2 CLJ 205 at p 224). Yet, the defendant submitted only on trespass but not nuisance. Trespass is interference with possession of land and whereas nuisance is interference with the use of land. This cause of action is based entirely on the state of land and the damages caused thereby at the date of the action; and hence, the first incident is not relevant.

(5) Therefore, I conclude that the defendant is liable to the plaintiff both in trespass (but not in respect of the permanent trespass because it is not for me to consider as it is not pleaded) and nuisance and that the plaintiff had suffered actual damage in consequence of the torts committed by the defendant.

[22] From the above passage it is clear to me that the judge had not only considered the facts, the evidence, but also the pleadings when he arrived at his conclusion. Even if I am not in agreement with his conclusion, sitting in an appellate court, I could not substitute his conclusion with one of my own unless there is clear evidence to show that his decision could not be supported by evidence or adverse of the evidence. In the present appeal, it is clear to me that not only the trial judge came to the right conclusion, but based on the evidence that was the only conclusion that he could come to. It is clear to me that upon reading the record, the appellant did not dispute the fact that they had trespassed on the respondent's land. They did not dispute the fact even after the respondent came into possession of the said land the trespass continued, as stated by the judge that when the respondent and his agents conducted a survey on the said land sometime in July 1991, they found the appellant had excavated a steep slope on the access reserve abutted to the respondent's land. The appellant submitted that there was no evidence being adduced by the respondent as to the first incident of trespass by the appellant and that being the case the trespass committed was prior to 10 June 1991 when the respondent came into possession of the land. The appellant did not deny the fact that the trespass continued even after the respondent came into possession of the said land. This is evidenced by the excavated road reserve which affected the respondent's land. In my view, the trespass committed by the appellant was a continuing act of trespass from the time when the respondent was not in possession of the land to the time he came into possession of the land and in fact continuing after he came into possession of the said land.

[23] In the present appeal there was no evidence to show that the previous possessor (the previous registered owner) of the said land had any knowledge of the act of trespass committed by the appellant or that he condoned the trespass by the appellant. In my view, the onus is on the appellant to show the trespass committed by them before the respondent came into possession of the said land had been permitted by the previous owner of the said land or that it was done with the full knowledge of the previous owner and he did nothing to stop it. In such a situation the evidence of first incident would be relevant. Further, in my view, it would only be valid as against the previous owner before he divested his possession of the said land. This would only be valid if the trespass had ceased when the respondent took possession of the said land.

[24] The evidence before the court was that the act of trespass committed by the appellant continued after the respondent came into possession of the said land. This could be seen from the notice by way of a letter given by the respondent to the appellant to cease the trespass and to stop the excavation. This letter was written in June 1991. By another letter dated 5 August 1991 by the respondent to the appellant whereby a survey was endorsed showing the extent of trespass committed by the appellant or their servants or agents. The reply from the appellant was also dated 5 August 1991 whereby they would instruct their surveyor to make a survey and settle the matter with the respondent. The survey by the appellant was only done in August 1992. This is clear evidence of continuing trespass even after the respondent came into possession of the said land.

[25] The issue of the first incident of trespass raised by the appellant would, in my view, be important if the trespass had ceased when the respondent came into possession of the said land and that no injury or damage was done to the said land. In the present appeal, not only the appellant committed tort of trespass but also of nuisance in that in the course of their trespass the appellant damaged and injured the said land which remained unremedied. The trial judge in his judgment made it clear that trespass was not the main issue anymore. For that reason the judge stated:

> On the remedies sought by the plaintiff, I decline to grant the declarations and the injunctions because:
>
> (i) in respect of declarations (a) and (b), the access reserve is already obsolete in view of the surrounding development where there is an alternative access to the plaintiffs land. Further, in the course of submission the plaintiff indicated that he was no longer interested in the access through the access reserve under the existing state of the land;
>
> (ii) for injunction (c), since the incident, except for the construction of the crib-wall, there had been no complaint of any alleged intrusion. Further, there is no reason now for the defendant to enter into the plaintiffs land.

(iii) with regard to mandatory injunctions (d), (e) and (f) and order (g), the plaintiff indicated during the submission that he was no longer interested in the reinforced earth wall because it might pose a serious danger to the residents of the condominium below on the defendant's land during the course of its construction. Further, a thorough supervision by an expert appointed by the parties or the court will be required in the course of its construction.

[26] Trespass was committed before and after the respondent took possession of the said land and it was a continuing trespass which ceased when the crib wall was constructed and completed, well after the respondent came into possession of the said land. Since there was no evidence that the previous owner of the said land knew of the trespass, it could not be said that the trespass committed by the appellant was done with the consent of the previous owner or that he had condoned it. The respondent, as I have stated earlier, made it clear in writing that he objected to the trespass and the nuisance resulting from that trespass. As such, I see no merit in the submission of the appellant that the first incident of trespass took place before the respondent came into possession of the said land.

[27] The third ground of appeal as found in the memorandum of appeal was the issue of possession. The appellant's learned counsel submitted that the judge ruled the lack of possession had not been pleaded by the appellant and that the appellant ought not to be allowed to submit on this issue. I could not find any fault in the ruling of the trial judge. It is the golden rule of pleading that one has to plead and the failure to do so has the effect of estopping the party raising that point. The judge made the right ruling. Anyway, in the present appeal it was not disputed that when the respondent came into possession of the said land, the trespass committed by the appellant was still continuing as I have pointed out earlier. In respect of this, I would like to refer to *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252. In that case the plaintiffs who were the registered owners of a piece of land brought an action against the defendant in which they alleged that the defendant's house was encroaching on their land. The plaintiffs made an interlocutory application by a summons in chambers for an order that the defendant do remove the encroaching portion of her house and be restrained from trespassing onto the plaintiffs' land and for an order for damages and costs. The defendant raised the issue of estoppel and acquiescence. The defendant alleged that her house was built in 1968 and that the plaintiffs had become the registered owners only in July 1980 and that the previous owner of the plaintiffs' land had never raised the issue of encroachment. Peh Swee Chin J (as he then was) at p 253 said:

> The first issue raised by the defendant was estoppel and acquiescence. This expression, 'estoppel and acquiescence' is apt to give rise to some confusion unless one bears in mind that the acquiescence is an element in the estoppel which is an equitable one. Learned counsel for the defendant, in this connection submitted that the house was built in 1968 and that the plaintiffs had become the registered owners only in July 1980. Scrutiny of the defendant's affidavit in this connection

also showed that the previous owner of the plaintiffs' land had never raised any issue of the encroachment.

Such was the scanty material on which the defence of equitable estoppel depended. The court perused the document of title of lot 781 and the previous registered owner who might possibly had been guilty of words or conduct giving rise to such equitable estoppel was one Soundaram d/o Karupan Chettiar who was such owner from 20 December 1956 to July 1980 when the plaintiffs became the registered owner. It was never even alleged that the said Soundaram had behaved in any way or spoken in any way that such equitable estoppel as was relied on by the defendant had arisen against her, and therefore the plaintiffs, .the present owners. It did not appear to be disputed that plaintiffs had not acted in any way to be so estopped from asserting their rights as owners. It would be wrong and also imposing an impossible burden on this court to imagine or suggest how the said Soundaram (whose name was never even mentioned by the defendant) had conducted herself in certain ways with regard to this equitable estoppel. The defence based on it therefore failed.

…

Next, it was submitted that the plaintiffs' action was barred by limitation of time, ie s 9(l) of the Limitation Act 1953. Section 9(1) provides:

> No action shall be brought by any person to recover land after the expiration of twelve years from the date on which the right of action accrued to him, or it first accrued to some person through whom he claims, to that person.
>
> (2) Nothing in this section ... shall be deemed to apply.
>
> (a) ...
>
> (b) To any person registered under or by virtue of the provision of the National Land Code ... as the proprietor of the land sought to be recovered or to any person claiming through a person so registered, except to the extent that such Code ... provides or permits.

Learned counsel for the plaintiff's submitted that the trespass was a continuing one, and still continued. I agree with the submission about the continuing trespass. In a continuing trespass a fresh cause of action arises *di die in diem,* ie from day to day. This would alone dispose of the defendant's contention.

[28] The situation in the present appeal is quite similar to the above case. In fact, the issues raised in grounds 1–3 of the memorandum of appeal are somewhat similar if not the same as the defence in the above case and as pointed out in the above they were lacking in merits. In respect of the continuing trespass I would like to refer to the case of *Tay Tuan Kiat & Anor v Pritam Singh Brar* [1987] 1 MLJ 276 where the learned judge at p 278 said:

Mr Rubin for the defendant submitted that the claim of the plaintiffs was for damages for trespass and not for recovery of possession of their property and the relevant period of limitation was that under section 6 of the Limitation Act, which is 6 years from the date the cause of action accrued. As more than 6 years had

elapsed since the defendant built the wall encroaching on the plaintiffs' property the claim of the plaintiffs was therefore time-barred. I am unable to accept this argument. The claim by the plaintiffs is in effect for possession of that portion of their property occupied by the retaining wall, though the claim was framed in a somewhat devious way. The plaintiffs did not ask for an order for possession of that portion of their property encroached upon by the retaining wall and the fence. They asked for an order requiring the defendant to demolish the existing retaining wall and rebuild a new wall in place thereof but within the boundary of the defendant's land. Such an order if made and complied with would in effect give to the plaintiffs possession of that portion of their property encroached upon. In my view, the relevant period of limitation is that under s 9 of the Limitation Act, which is 12 years from the date the cause of action accrued. *Further, assuming that the claim is only one for damages for trespass, it has still not been time-barred: the trespass complained of is that caused by the retaining wall constructed by the defendant on the plaintiffs' property and the wall is still encroaching on their property: in other words, the trespass is continuing. This defence therefore clearly cannot stand*. (Emphasis made).

[29] The situation in the present appeal, in my view, is worse not only the appellant committed trespass on the said land when the respondent took possession of the land but the excavation by the appellant which seriously affected the said land was never remedied which rendered part of the land useless. When the respondent came into possession of the said land there was evidence to show that the appellant was excavating the access reserve and in that process intruded into the respondent's land. There was also evidence that because of the excavation of the access reserve the respondent's land could not have access from the access reserve permanently. The appellant did not deny this. In my view, as long as the condition of the said land remained the same the trespass is continuing. In view of the continuing trespass, it does not matter whether the respondent was in possession of the said land when the first incident of trespass took place. It was not disputed that the respondent came into possession when the excavation was still being carried out by the appellant. As such, it would not matter whether the learned judge was right in his ruling about the pleading on possession.

[30] From the memorandum of appeal it is clear to me that the three grounds raised by the appellant were the only grounds in respect of liability. As such there is merit in the submission of the appellant in respect of liability.

[31] In respect of quantum, the learned counsel for the appellant submitted that the learned judge was in error in holding that the cost of repair or reinstatement was the true measure of damages in rejecting the diminution of value test. He further submitted that the learned judge failed to appreciate that the usual and general test was the amount by which the value of the land has been diminished and not the cost of restoration. He went on to submit that the learned judge failed to appreciate that the 'cost of restoration' test can only be applied in exceptional circumstances where the claimant intends to do the work, and make good the harm to his property, and where the

expenditures are reasonable. In this respect the learned counsel submitted that the learned judge was also in error in accepting the figure of RM3 million when it was only an estimate given by an engineer who did not prepare any drawing or design for such a wall.

[32] The learned judge in his judgment in respect of this stated:

The following facts are pertinent for the purpose of assessment:

(i) The plaintiff bought the land at RM52,000 per acre;

(ii) The land was still agricultural at the time of the incidents;

(iii) On 1 July 1992, the plaintiff applied for conversion to residential (re B–14 and B–15);

(iv) On 6 June 1996, the conversion was approved (re B–218);

(v) On 7 August 1996, SP4 valued the property based on the layout plan at B–234. In his report he valued the land at RM35 psf (re B–280) and at the trial he valued at RM38 psf;

(vi) On 12 March 1997, the plaintiff applied for subdivision of the land as per layout plan at B–234;

(vii) On 14 August 1998, the subdivision was approved (re Ik D);

On those facts, the following are discernible:

(i) At the time when the torts were committed the land was still agricultural and that the plaintiff had no definite development plan, though he intended to develop his land;

(ii) The valuation was based on the layout plan which had not been approved.

On those facts, to my mind, whichever value of the land is taken for the assessment, that is to say, either the value at the time when the torts were committed or the value at the date of valuation, it will be unrealistic and unfair to either party, as the case may be. Therefore, I decline to assess damages by taking the capital value of the property in an undamaged state and comparing it with its value in damaged state, that is to say, diminution in value cannot be the true measure of damages in this case. And also, on the facts, I am unable to assess as such. Hence, the only alternative left is to take the cost of repair or reinstatement, which, to my mind, is the true measure of damage since I am satisfied from the evidence that all along the plaintiff intended to develop the land according to the subdivision as approved. Even if the plaintiff now changes his mind and wants to sell the land it is doubtful whether the property in its existing state can be sold at all or at a good price due to the substantial costs that will have to be expanded in stabilizing the slope. In any event, if the plaintiff is to put the land to any use at all the construction of a retaining wall is the only solution because the danger to life and property, both to the occupants above and below is clearly foreseeable. The computation and quantification of the cost of reinstatement had been established by SP5 in his testimony and report in 1993 at RM3 million (B–71) based on plans B–21 and B–22 which

had not been seriously challenged. Although the figure is only an estimate and SP5 did not have any particular type of wall in mind, I accept that figure as reasonable for the cost of reinstatement by reason of SPS's vast experience as a professional and qualified engineer. As the figure was given some eight years ago, to my mind, it is appropriate to increase it by at least 20%, that is to say, to RM3.6 million. With that amount the plaintiff will be in a position to take positive steps to stabilize the slope in order to meet his requirements in the development of his land, which will be at his discretion and risk.

[33] It is necessary for me to cite the above passage, however long it is, to show that the trial judge had considered all options available to arrive at the cost of repair or reinstatement as to the true measure of damage. In fact, the learned judge was of the view that the method adopted by him was the fairest to determine the damages suffered by the respondent.

[34] In his submission, the appellant's learned counsel submitted that the learned judge did not appreciate that the appellant had abandoned any claim to restoration and that the respondent in his submission had indicated that he was no longer interested in the reinforced earth wall. That being the case, it was submitted by the respondent that the proper' method to measure the damages should be the diminution of value, in which case the damage must be assessed on the date of the occurrence of the damage.

[35] From the record, it is clear to me that there was nothing to show that the respondent had abandoned the claim for restoration. There is no doubt that in the course of his submission, the respondent stated that he was no longer interested in the reinforced earth wall because in the course of constructing the reinforced earth wall, it would pose a danger to the houses and the apartments below. It was in the interest of all parties including the appellant who were the developer of the houses and the apartments that the construction of the reinforced earth wall should not be carried out until a safer and better method was to be found. It is to be noted that the construction of the reinforced earth wall would be of a considerable height and steep because of the excavation done by the appellant was so deep. In my view, when the respondent stated that he was not interested in constructing the reinforced earth wall at that time, the respondent was being practical taking into consideration the danger posed to the properties and human lives below. The respondent only stated that he was not interested in the reinforced earth wall but that would not mean that he had abandoned his claim for repair and restoration. There are other ways of repair and restoration such as bringing down the affected part of the said land to a manageable level. In the present appeal, the learned judge in assessing the damages had the benefit of hearing and evaluating the evidence of SP5 who was an expert witness called upon by the respondent. The appellant did not call any witness or adduce any evidence to rebut his evidence. It must be borne in mind that SP5 was subjected to cross-examination by the appellant. It is clear to me that the appellant were adamant that the

diminution of value was the only method in calculating the damages because that would be the cheapest. The appellant would be on stronger ground in seeking the diminution of value if the respondent did nothing towards developing the said land. But that was not the case here because there was evidence to show that the respondent applied for the said land to be developed. The reason why the appellant were insistent that the diminution of value be applicable in the present appeal could be seen from the appellant's learned counsel's submission that the capital value would be paid by the respondent which was at RM52,000 per acre.

[36] The trial judge in his judgment gave his reasons why he declined to assess the damages by way of diminution of value. The learned judge took into consideration that the respondent intended to develop the land. The respondent applied for conversion of the said land on 1 July 1992 and this was approved on 7 August 1996. As to the diminution of value of the said land, the learned judge was of the view that would be unjust to the respondent because when the respondent bought the land it was for the purpose of developing it into a housing scheme and for that purpose he applied for conversion and subdivision where, as stated by the respondent, the value after the conversion and subdivision would be RM35 per square foot. The learned judge was of the view if damages were to be awarded on that rate to the total area affected it would be unfair to the appellant.

[37] As I have stated earlier, in assessing the damages using the cost of repair and restoration method, the trial judge had the benefit of hearing the evidence of SP5. The computation of the cost of repair and reinstatement as stated by SP5 was RM3 million at the time when the incident occurred. The learned judge, in consideration of the time lapse until the trial was completed which was some eight years' period. For that period the learned judge awarded an additional of 20% of the computation for the time lapse. The learned judge in awarding that amount took the view that with that amount the respondent would be able to stabilize the slope and meet with the respondent's requirements in the development which, if undertaken by the respondent, would be done at his own discretion. By stabilizing the slope, the learned judge was of the view that the said land could be developed by the respondent at his own risk. The respondent also had an option not to develop that part of the said land and the damages awarded would be adequate compensation.

[38] I am of the view that the trial judge in awarding the damages had taken into consideration what was just and fair to all parties concerned; taking into consideration the sufferings of the respondent who saw his intention of developing the whole of the said land being demolished and the attitude of the appellant in total disregard and disrespect of the rights and properties of their neighbours.

[39] The learned judge, in his judgment, found that the appellant's conduct of trespassing was a conduct calculated to result in profit to the appellant. Despite the notice being given by the respondent in respect of the trespass, the appellant persisted in the trespass until the project in respect of that part of their land had been completed. The appellant did not deny the trespass and as a result of that the respondent's land was damaged. For the above reasons I see no reason to differ from the finding of the trial judge in respect of the damages. Taking the circumstances and the scenario of what happened and the attitude of the parties, I am of the view that the learned judge was justified in awarding that amount.

[40] In addition to the above damages, the learned judge also awarded the sum of RM900,000 as exemplary damages. The appellant's learned counsel submitted that the learned judge was in error when he awarded exemplary damages. It was the contention of the appellant that exemplary damages should not be awarded in the present appeal. It was submitted that exemplary damages should not be awarded because compensatory damages had been awarded. The learned judge found that the conduct of the appellant in committing trespass and nuisance was calculated to make profit. According to the learned judge, this was one of the three categories where exemplary damages could be awarded. He then cited a passage by Lord Devlin in *Rookes v Barnard* [1964] AC 1129:

> Where a defendant with a cynical disregard for the plaintiffs right has calculated that the money be made out of his wrongdoings will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expenses of the plaintiff some object — perhaps some property which he covets — which he either could not obtain at all or not obtain except at a price greater than he wants to put down.

[41] What is meant by 'calculated to make a profit' was explained by Edgar Joseph Jr SCJ (as he then was) in *Chen Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352:

> In *Cassel & Co v Broome* [1972] 1 All ER 801 Lord Morris explained the ambit of the expression 'calculated to make a profit' used by Lord Devlin in *Rookes v Barnard*. This is how he put it at p 843: There may be exemplary damages if a defendant has formed and be guided by the view that though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.

[42] In this respect the learned judge in his judgment correctly pointed out that the conduct of the parties must remain a relevant consideration in the calculation of exemplary damages and he then cited with approval para 465 of '*McGregor On Damages*' which states:

> Then the Court may take into account, according to the decision in *Praed v Graham* (1889) 24 QBD 53, the conduct of the defendant right down to the time of judgment ... . An apology by the defendant in the witness box would make a difference in his favour, according to Singleton LJ in *London v Ryder*, while persistence in the charge might increase exemplary damages.

[43] The learned judge went on to say in considering the exemplary damages, the means of the parties, the size of the award must be sufficient to punish the wrongdoer. In determining this, the learned judge then went on to state the finding of facts the basis of which he awarded the exemplary damages.

[44] The facts disclosed that in June 1991, the respondent by a letter alerted the appellant of the steep slope at the boundary of his land caused by the excavation but the appellant did not take any step to investigate into the complaint and continued the excavation. The respondent by a letter dated 5August 1991 to the appellant enclosing a survey showing the trespass committed by the appellant but the appellant ignored the implication. The reply from the appellant dated 5 August 1991 was that they would instruct their surveyor to make a survey and then to settle the matter with the respondent. The first survey carried out by the appellant was only in August 1992 (about one year later). By then the slope had increased by 19 feet in height. In December 1992 the respondent conducted a second survey and he found that the slope had increased by 49 feet in height and also in length and in depth compared to the first survey conducted by him. With that the learned judge concluded the trespass committed by the appellant was deliberate and intentional and also carried out with cynical disregard for the respondent's right. The learned judge was of the opinion that the appellant's conduct was calculated to result in a profit. The evidence of SP5 confirmed that the appellant would not lose any land because the slope was placed on the respondent's land. According to SP5 the cost of putting up the retaining wall would be very expensive but necessary and in not putting up the retaining wall the appellant saved a lot of money. The learned judge found that the appellant felt that the gain from the deliberate trespass would outweigh the compensation he might have to pay. He based his view in the pleading where at para 12 of the appellant's statement of defence which stated:

> The defendant avers that Lot 1360 has no development potential as claimed by the plaintiff and that the purported proposal of the plaintiff to develop Lot 1360 into a residential housing condominium is an utter fabrication which has no relation to the realities affecting Lot 1360 as an agricultural land.

[45] I agree with the learned judge's view that the statement to mean that the respondent was somebody who was without means to develop the said land and that in that area the appellant were the only one with the capability and the means to carry out those types of development.

[46] The learned judge in his judgment enumerated the following facts to show the conduct of the appellant:

(i) the excavation on the plaintiff's land was earned out before the earthworks plan was approved and consequently illegal and unauthorized;

(ii) despite verbal and written promises, the defendant to date has not approached the plaintiff to discuss in resolving the problem and the plaintiffs consulting engineers numerous efforts to suggest remedial works have not met with any response;

(iii) despite indisputable evidence represented by the survey plans, the defendant persisted in denying encroachment and proffered unarguable defence that the earthworks were sanctioned by the appropriate authorities and/or that there were no further encroachment between the plaintiffs first survey (B–8) and the second survey (B–20). As a result, the plaintiffs land was tied up in legal action for almost eight years and effectively frozen;

(iv) the defendant's representative SD1 and the project manager SD5 were, since the beginning of this action and at the beginning of this action and at the trial, less than candid, endeavouring to justify and sustain the obviously unsustainable; and

(v) in contemptuous disrespect of the law and to the plaintiffs right and the remedies sought, the defendant had in the midst of this action, proceeded with further works at the slope by constructing the crib wall without notice to the plaintiff or his consultant resulting in permanent encroachment and affecting future remedial works.

[47] It is clear from the above that the learned judge found that the conduct of the appellant was not only calculated to result in a profit but also of total disregard to their neighbour. The appellant would ignore any complaint as long as they could get the benefit in term of money return from what they were doing. The appellant wanted to get the full benefit from their land at the expense of others. As such I am of the view that the learned judge was right in awarding exemplary damages.

[48] There is no fixed formula or rate in awarding exemplary damages. In the present appeal, the trial judge awarded the sum of RM900,000. In his judgment the learned judge stated that he followed the formula in *Templeton v Low Yat Holdings Sdn Bhd* [1993] 1 MLJ 443 where the court awarded exemplary damages of about 25% of the compensatory damages assessed. In the present appeal the compensatory damages by the learned judge was RM3.2 million and 25% of that would be RM900,000. That was how the learned judge arrived at the figure. I see no reason to disturb the award made by the learned judge.

[49] In view of what I have stated above, I see no reason to disturb the finding of the learned judge and the award made by him. I have read his judgment and found that his judgment is supported by findings of facts and the law. By majority, the decision of the learned judge in respect of liability and quantum was upheld.

[50] The appeal should be dismissed with costs. The deposit is to be paid to the respondent to account of taxed costs.

[51] Datuk Mohd Saari Yusoff (now retired) has seen this judgment in draft and conveyed his agreement to it.

Abdul Aziz Mohamad JCA (dissenting judgment):

[52] The respondent was the registered proprietor of a piece of vacant land measuring 6.437 acres in the Mukim of Cheras, Kuala Lumpur. The appellant company were the owner of a huge piece of land measuring 500 acres which was separated from the respondent's land by a strip of State land measuring 40 feet wide, part of which formed the southern boundary measuring 710 feet long of the respondent's land and which the respondent claimed was earmarked as part of a network of road reserve to provide access to his land and the lands adjoining it. For the three years before the date of the respondent's statement of claim, which was 22 December 1993, the appellants had been carrying on works on their land to develop a golf course and a huge residential and commercial complex known as Bandar Sungai Long.

[53] In para 5 of his statement of claim the respondent averred that in or about July 1991 he discovered that 'the [appellants] had in the process of executing the development works excavated a steep slope on the road reserve … and otherwise encroached and/or cut into the [respondent's] land'. The steep slope was said to be about 50 feet high and 400 feet long at the southern boundary of the respondent's land. In para 6 the respondent alleged that as a result his land was deprived of any access via the road reserve and of support, to the prejudice of his use and enjoyment of the land. The respondent claimed 'act of trespass and/or nuisance'.

[54] In para 9 of his statement of claim the respondent averred that in December 1992 he discovered that the appellants had further 'encroached/ trespassed' onto his land by excavating approximately another 50 feet from the land throughout the length of its southern boundary, thereby creating a 'steeper slope' of 100 feet high and more than 700 feet long. In para 10 the respondent averred that the further excavation compounded the already dangerous situation caused by the earlier excavation.

[55] The trial judge found the appellants liable to the respondent both in trespass and in nuisance. He found that the respondent had suffered actual damage in consequence of those torts and he awarded damages. The learned

judge said that the appellants had not submitted on nuisance. It is a fact that despite the respondent having made it clear in his written submission that his claim was also in nuisance and having submitted on a case for nuisance, the appellants did not in their written submission argue against the respondent's case for nuisance.

[56] In their appeal before us, the appellants also submitted only against the learned judge's finding as to liability for trespass, the crux of their submission being that the respondent had no *locus standi* to sue in respect of the first incident of trespass in 1991. The appellants did not submit against the learned judge's finding of liability for nuisance. After hearing the appeal, I had reservations on the *locus standi* question and was not ready to decide on it, but I was content to join my brothers in dismissing the appeal as regards liability, on the basis that the learned judge's finding of liability for nuisance was not challenged. I had no difficulty in deciding that the appeal as regards the award of damages be also dismissed.

[57] I now propose to deal with the question of *locus standi* as it relates to the respondent's claim in trespass.

[58] Since trespass is an injury to a possessory right, the proper plaintiff in an action of trespass to land is a person who was in possession of the land at the time of the trespass. But if the land is vacant land, as the respondent's land in this case was, the owner has sufficient possession to sue in trespass. The respondent, in his statement of claim, did not plead a right to possession. He merely pleaded, in para 1, that he was the registered proprietor of the land. It may, however, be implied that the respondent's case was that by virtue of being the registered proprietor of the land, he was in possession of it. It may also be implied that therefore the respondent's case was that the two incidents of trespass occurred after be became registered proprietor.

[59] In reply to para 1 of the statement of claim, the appellants averred that the respondent had purchased the land, and became the registered proprietor of it on 27 July 1991. But the appellants did not state what the import was of that averment to their defence, and this led the respondent to state in para 2 of his reply that the appellants' averment was irrelevant to the question whether the appellants had encroached or cut into the respondent's land and deprived it of access and occasioned it loss of support. Apart from averring the date that the respondent became the registered proprietor of the land, the appellants' defence was essentially to deny the allegations of trespass. In reply to the respondent's allegation in para 5 of his statement of claim, the appellants, in para 5 of their statement of defence, while admitting that they did carry out earthworks on the respondent's land, denied the rest of the respondent's averments and maintained that the works were carried out in accordance with the approved plans and drawings for Bandar Sungai Long. The respondent's allegation in para 9 of their statement of claim about the second incident of trespass in 1992 was countered by the appellants in para 14 of their statement of defence with a complete denial.

[60] During the trial, the respondent in his examination-in-chief said that it was in June 1991 that he discovered that the appellants were cutting into his land, which was contrary to para 5 of the statement of claim if that para intended to say that it was in July 1991 that the appellants encroached or cut into the respondent's land. This was what the respondent said in his examination-in-chief:

> In June 1991 I discovered that the defendant was cutting into my land … . These are the particulars of the works done by the defendant confirmed after a survey was done … . I wrote to the defendant complaining about its cutting of the steep slope. I was concerned about the stability of the slope as it would affect my land. Thereafter, I asked my surveyor to survey.

[61] The letter that the respondent wrote to the appellants was dated 10 June 1991. In it the respondent said, among other things:

> I note that you have recently excavated the hill and road reserve abutting my land which involves cutting an extremely steep slope on the road reserve, thus depriving me an access through the road reserve.

[62] It is clear from the respondent's evidence that he wrote the letter after he discovered that the appellants were cutting into his land. Although the letter did not complain about encroachment into the respondent's land, the fact remains that, according to the respondent's evidence, when he wrote the letter on 10 June 1991 the appellants had already cut into his land. Therefore, on the respondent's own evidence, the first incident of trespass occurred before 10 June 1991.

[63] As to the survey, according to the surveyor the first survey was carried out on 18 July 1991. The plan at p 641 of the appeal record states the date of survey as 18 July 1991 and the date when the plan was checked as 25 July 1991, two days before the respondent became registered proprietor of his land.

[64] In cross-examination, the respondent confirmed the appellants' averment in their statement of defence that he became registered proprietor of his land on 27 July 1991.

[65] In the High Court, the appellants' learned counsel, relying on the evidence that the first incident of trespass occurred before 10 June 1991, submitted that since the respondent became registered proprietor of his land on 27 July 1991, and did not have legal possession of the land before that date, he had no standing to sue in respect of the first incident.

[66] As to the second incident, which occurred after the respondent became registered proprietor, the appellants' learned counsel submitted that, on the evidence, whatever form of trespass that occurred in the second incident was limited to the areas that had been subjected to the earthworks in the first incident and that therefore there should be an award only of damages, which should be minimal, for the loss that occurred in the period between the two

incidents and there should not be an award for the loss that occurred before the respondent became registered proprietor. Much the same kind of argument was advanced in the appeal.

[67] The trial judge found that the respondent's right of entry to the land accrued on 29 June 1991 when the balance of the purchase price was timeously paid to the vendor. He then said:

> By the doctrine of relation back, if an owner who has a right to enter makes an entry on land, his right of possession related back to the time at which his right of entry accrued, and he may sue for a trespass committed before his entry, the wrongdoer thus becoming a trespasser by relation … . The plaintiff and his agents entered and took physical possession of the land on 18 July 1991 …, that is to say, before the first incident when the first survey was conducted. Therefore, by the doctrine of relation back, the plaintiff is clearly entitled to maintain this action even though he was not in physical possession at the time of the first incident.

[68] That was one of the two decisions of the learned judge as regards liability for trespass that the appellants in the appeal before us submitted that the learned judge erred in. It is the second sentence of the passage that is crucial. The learned judge obviously considered 18 July 1991 as the date when the respondent took physical possession of the land. 18 July was the date when, according to the surveyor and the plan at p 641 of the appeal record, the first survey was conducted. Obviously the learned judge considered that the entry into the land by the respondent's agent, the surveyor, on 18 July 1991 to conduct the survey was the taking of physical possession of the land by the respondent. Then the learned judge said that 18 July 1991 was before the first incident of trespass. The learned judge did not state what he considered the date of the first incident was, but he said that it was 'when the first survey was conducted'. As to when he considered that the first survey was conducted, an indication may be found earlier in his judgment, at p 12 of the judgment, where, in what apparently is a narrative of the appellants' contention, he mentioned, in relation to the first incident, the date 25 July 1991, that is the date of the plan at p 641 of the appeal record. If the learned judge considered, as he apparently did, that 25 July 1991 was the date of the first incident, and the date when the first survey was conducted, he was in error because 25 July 1991 was the date of the checking of the plan for the first survey which was conducted on 18 July 1991 and in any case the first incident could not have taken place even on 18 July 1991, because 18 July 1991 being the date of the survey in relation to the first incident, the first incident must have occurred earlier. But the greater error made by the learned judge was in overlooking the respondent's own admission that the first incident occurred before 10 June 1991, that is even before the respondent acquired the right of entry to the land, which the learned judge found to be on 29 June 1991. Since the first incident of trespass occurred before the respondent became registered proprietor of the land, and even before he became entitled

to possession of the land, the respondent did not have *locus standi* to sue in trespass in respect of the first incident.

[69] The learned judge also ruled that in any case the appellants were not entitled to submit on the issue of possession in respect of the first incident of trespass because they had not pleaded the issue in their defence. Relying on O 18 r 8(1) of the Rules of the High Court 1980 and pleading No 1219 at p 1324 of *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Ed, he said that the defence of denial of the respondent's possessory title must be specifically pleaded. That was the other of the two decisions of the learned judge as regards liability for trespass that the appellants in the appeal submitted that the learned judge erred in.

[70] It is true that apart from pleading that the respondent became the registered proprietor on 27 July 1991 the appellants did not plead a defence of denial of possession. Their defence was essentially one of denial of trespass. In the appeal, the appellants' learned counsel submitted that the appellants could only plead against what was averred in the statement of claim, in which the respondent merely relied on his being the registered proprietor, and did not plead possession. There is, I think, some merit in that submission. By relying on his registered proprietorship, the respondent must be understood to mean that he became entitled to possession on becoming registered proprietor and that therefore both the incidents of trespass occurred after he became registered proprietor, which he knew was on 27 July 1991. He could not have intended to base his case on a trespass occurring, and on a right to possession accruing, before he became registered proprietor, because he would have had no case unless he pleaded that he had rightfully entered into possession earlier, which he did not. Relying as he did on his becoming registered proprietor on 27 July 1991, he did not specifically give the date of the first incident of trespass, which must be a date after 27 July 1991 if he was to have *locus standi* to sue in respect of the first incident. In para 5 of his statement of claim he said, 'In or about July 1991 [he] discovered that the [appellants] had … excavated a steep slope on the road reserve … and otherwise encroached and/or cut into [his] land'. It was an averment of a *discovery* in or about July 1991 of events that *had* happened. The statement of claim itself came perilously near to disclosing no cause of action in respect of the first incident of trespass. I say so because if the respondent had expressly disclosed in his statement of claim that he became registered proprietor on 27July 1991, para 5 was vague as to when the first incident of trespass took place and was so worded that it was more likely to have occurred before 27July 1991 or at least it included the possibility of its occurring before that date.

[71] The appellants' pleaded defence being essentially one of denial, and the statement of claim being as it was, the appellants could not very well have come up in their statement of defence with an admission that the first incident of trespass occurred before 10 June 1991 and a claim that at that date the

respondent did not have possession of the land or any right to possession of it. When, however, the respondent himself, in his examination-in-chief, claimed that the first incident of trespass occurred before 10 June 1991, he revealed that he had no *locus standi* to sue in respect of the first incident, and the appellants' learned counsel was, in my opinion, although this was not advanced in submission, entitled to submit that he had no *locus standi*, not as a matter of defence that the appellants had to plead and had to prove, but as a matter of failure of the respondent to make out a prima facie case of *locus standi* or, worse still, as a matter of the respondent's case itself negating *locus standi*. To deny the appellants the right to argue about *locus standi* because it had not been pleaded would be to allow the respondent to claim in trespass when his own case showed that he was not entitled to do so. Had the date when the respondent became registered proprietor and the date of the first incident of trespass that the respondent claimed in evidence been specifically pleaded in the statement of claim, the appellants would have been entitled, without pleading any defence, to have the statement of claim struck out, as far as the first incident was concerned, for failing to disclose a cause of action.

[72] I turn now to the question of compensatory damages. The learned judge held that the cost of repair or reinstatement of the respondent's land would be the true measure of damages and not the diminution in the value of the land. The learned judge accepted the evidence of the respondent's consultant engineer that it would cost RM3 million to stabilize the slope by the construction of a retaining wall. He added 20% to the sum, making it RM3.6 million, because the estimate of RM3 million was given eight years before the judgment, in a report in 1993. He also awarded RM900,000 as exemplary damages, and RM16,248 as special damages.

[73] The appellants applied, by a notice of motion, for leave, 'in the event that leave is necessary', to adduce further evidence in their appeal. The further evidence was as to a matter that occurred after the date of the decision of the High Court in this case, namely, evidence of extensive earthworks that were being carried out on the respondent's land that, it was claimed, would bring down the 'platform levels' of the land. The main purpose of the evidence was to prove that there would no longer be any need to construct a retaining wall to stabilize the slope of the respondent's land or, even if a retaining wall was still required, that its cost would be greatly reduced 'due to loss of land surcharge (weight of soil)', so that the compensatory damages would now not be as much as the RM3.6 million that was awarded.

[74] The respondent opposed the application. In his affidavit he contended, among other things, that the recent earthworks did not affect the height and configuration of the slope, that it is not permissible to ask the appellate court to reassess damages that have been properly assessed at the trial and that, in any event, the evidence failed to satisfy the three conditions for its reception.

I understood the three conditions to be those that may be drawn from para (3A) of r 7 of the Rules of the Court of Appeal 1994.

[75] We heard the application before commencing to hear the appeal. It was dismissed by a majority decision without hearing learned counsel for the respondent. I was of the view, after hearing the submission of the appellants' learned counsel and not having the opportunity to hear the submission of the respondent's learned counsel, that the application should be allowed. I proceed to state my reasons.

[76] The question of the giving and reception of further evidence for civil appeals to the Court of Appeal is dealt with in s 69 of the Courts of Judicature Act 1964. The section has five sub-sections. The sub-sections relevant to the question are the first three, which I quote:

> (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

[77] It is clear from sub-s (2) that if the further evidence is as to matters which have occurred after the decision appealed from, it may be given 'in any case'. No leave is required. The giving of further evidence as to post-decision matters is a matter of right. It is also clear from the words 'save as to matters subsequent as aforesaid' in sub-s (3) that the requirements of special grounds and of leave laid down by the sub-s do not apply to post-decision matters.

[78] Except for the words 'Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals' in sub-s (1), the whole of s 69, all the five sub-sections of it, were, with very slight immaterial differences, reproduced in r 7 of the Rules of the Court of Appeal 1994, the five sub-sections becoming the five paras of the rule in the same order. The effect of r 7 was of course the same as that of s 69. As far as post-decision matters are concerned, the giving of further evidence is a matter of right.

[79] Now a provision of an Act of Parliament ought not be re-enacted in subsidiary legislation, because the re-enactment will be merely an echo that has no existence, life or force of its own. Remove it, and the law is still there in the Act. Further, if the re-enactment is with modification, the modification is *ultra vires* and ineffective because it seeks to make modification in the law

through subsidiary legislation in an area that Parliament has enacted for, unless the power to modify is expressly given by Parliament. The modification will inevitably have effects that are inconsistent with or repugnant to the provision as enacted by Parliament, and subsidiary legislation is incapable of doing that.

[80] I have to say all that because in 1998 r 7 was amended by introducing the following para (3A):

> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:
>
> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

[81] That is the paragraph that I mentioned earlier in connection with the three conditions to be satisfied. It imposes restrictions where none existed before. Further, the requirement in para (b) that the new evidence would have had or would have been likely to have had a determining influence on the decision that was made, read with para (a), would suggest that further evidence would only be allowed as to matters in existence before the decision, whereas previously further evidence as to post-decision matters was allowed, and as of right too.

[82] The changes brought about by para (3A) have not been made to s 69. Since para (3A) seeks to cling to r 7, and since r 7 has no existence, life or force of its own, but is merely an echo of s 69, r (3A) is nothing more but an attempt by subsidiary legislation to modify s 69. The attempt is *ultra vires* because subsidiary legislation is not capable of modifying an Act of Parliament, except by express authority of Parliament, which did not exist here.

[83] I was of the view, therefore, that s 69 is not affected by para (3A) and further evidence as to post-decision matters may still be given, and as of right. Therefore, merely as a formality to dispel any doubt, leave should be given to the appellants to give the further evidence that they sought to give. The question of its weight and effect would be matters to be considered in the appeal itself.

[84] As the appellants' application to adduce further evidence was refused, the appeal as to damages proceeded on the basis of the evidence as it stood in the trial. At the conclusion of the appeal I was, as I said, of the view that the appeal as regards liability should be dismissed on the basis of the existence of liability for nuisance even though I was not ready to decide on the question of liability for trespass. Assuming that the considerations for damages for

nuisance in this case would not be different from those for damages for trespass, I saw no reason to disturb the learned judge's award of compensatory and exemplary damages. I agree with the reasons set out by my brother, Mokhtar Sidin JCA, for upholding the award.

Appeal dismissed.

Reported by Sally Kee